No. 1262



IN THE

# Supreme Court of the United States

October Term, 1946

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

*v.*

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.,
Appellees.

## BRIEF OF PANHANDLE EASTERN PIPE LINE COMPANY, APPELLANT, IN OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM

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### Statement

The Public Service Commission of Indiana and the members thereof (being the principal appellees herein) have filed a motion to dismiss the appeal herein on the ground that the case presents no substantial federal question or, in the alternative, to affirm the judgment of the Supreme Court of Indiana, from which this appeal is taken, on the ground that "the questions upon which this decision depends are so unsubstantial as to need no further argument", and they rely for support of their motion upon their "Statement of Grounds Making Against the Jurisdiction of This Court" to which the motion is attached.

Appellant has set forth fully in its Statement as to Jurisdiction on Appeal, filed with its appeal papers herein: the nature of the case and the statutory provisions sustaining jurisdiction; the state statutes, the validity of which is involved; the date of the judgment appealed from and the date on which the application for appeal was presented and allowed; the manner in which the federal question was raised; the opinions below; and the grounds upon which it is contended that the questions involved are substantial. A restatement here of those matters would be repetitious and burdensome to the Court, and, therefore, appellant incorporates herein, by reference, its aforesaid Jurisdictional Statement and respectfully refers the Court to such statement for a full exposition of these matters and, particularly, the grounds upon which appellant contends that a substantial federal question is presented and appellees' motion should be denied. Our discussion herein will be confined to a reply to certain arguments advanced by appellees, in support of their motion, which are not fully covered in appellant's Jurisdictional Statement.

## Argument

1. Appellees contend that the order herein involved is of the type which was before this Court in *Arkansas Gas Co.* v. *Department*, 304 U. S. 61 and *Natural Gas Pipe Line Company* v. *Slattery*, 302 U. S. 300. That is not so; those cases are clearly distinguishable from this case.

In the Arkansas case, the Gas Company was engaged extensively in local sale and distribution of gas, which business was conceded to be subject to local regulation, and was also engaged in making interstate sales directly to "pipeline customers." It refused to give the information requested by the state regulatory body with respect

to its interstate sales. This Court said (304 U. S. 63):

> In such circumstances it may be highly important for the state authorities to have information concerning all its operations.

The Gas Company did not, as the appellant did here, offer to supply the data for the information of the state authorities.

In the Natural Gas Pipe Line Company case, a similar situation was presented in that the local distributing company under investigation by the Illinois Commission was so closely affiliated with its interstate supplier, Natural Gas Pipe Line Company, that information with respect to the reasonableness of the rate charged the local distributing company was deemed essential in fixing reasonable rates for the sale of gas by the latter. The order in that case merely directed the Natural Gas Pipe Line Company to make its accounts and records available for examination by the Commission. Natural Gas Pipe Line Company refused to permit the Commission to have access to its books and records and sought an injunction without exhausting its administrative remedies.

Here, appellant has only two direct sale customers in Indiana, no local distribution at all, and no affiliation of any kind with the Indiana distributors which it supplies. Its rates to these distributors are fixed by the Federal Power Commission. Appellant has not only exhausted its administrative remedies but has shown that, recognizing the import of this Court's decision in the Arkansas case, it offered to supply the material required by the order for the information of the Indiana Commission. The Commission refused this offer. It said (R. 239):

> The Commission certainly has no desire that any of the parties to this cause, or the court before whom the Appeal is pending, or any consumer, public utility or other interested person, should be in any doubt as

to the conclusions to which the Commission came in this cause as to its regulatory jurisdiction over sales direct to Indiana consumers of natural gas that has moved into the state in interstate commerce. The Commission thought that position was made as clear as language could make it by the findings and opinion in the Original Order. Though not required by statute to incorporate in an order either findings or opinion, the Commission did in the Original Order, because of the importance of this matter and to the end that the parties should be fully informed as to its conclusions, set forth in detail both its findings and its opinion as to its regulatory control. After an extended discussion of its views, the Commission said unequivocally therein (p. 82) that it concluded 'that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state.' Those laws place on the Commission, as the state regulatory agency, the power and duty, whenever action is necessary in the public interest, to make reasonable regulations of rates and service. This duty the Commission proposes to exercise when and as public interest requires action. The conclusion above quoted did and does express its position on this question. • • •

IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION OF INDIANA that the request contained in Respondent's offer that the Commission modify, change or limit the scope of the Original Order be and the same is hereby denied; that Respondent's Offer be, and the same is hereby rejected by the Commission; *that a conditional filing, as proposed by Panhandle* in Respondent's Offer, of the tariffs of rates, rules and regulations, the annual reports and the accounting information, or any of them, required to be filed by Panhadle by and under the Original Order *will not constitute compliance with the Original Order,*

and that the tariffs of rates, rules and regulations, the anual reports and the accounting information, when filed, shall be deemed to be on file for and to be available for use by the Commission for, all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana. (Emphasis supplied.).

Appellees' contention that the orders of the Indiana Commission in this case went no further than those involved in the Arkansas and Illinois cases was rejected by the Supreme Court of Indiana. It said (R. 261):

> We hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellees' interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

We submit that this precise question is settled by the decision of this Court in *Public Utilities Comission* v. *United Fuel Gas Company*, 317 U. S. 456. In that case, the Public Utilities Commission of Ohio, while investigating rates charged by a local distributing company to the City of Portsmouth, Ohio, concluded that sales to that company by United Fuel Gas Company, of gas transmitted in interstate commerce, constituted a public utility service as defined by the Ohio statute, and that, consequently, it

had authority to regulate rates for those sales as well as for the distribution rates of the local company. Acting on this conclusion, it entered an order directing United to furnish "all relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Porstmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio." United filed a petition for rehearing asserting that its sales to Portsmouth were in interstate commerce; that the two companies were independent; and that the Commission had gone beyond its power in asserting jurisdiction to fix rates for United's sales to the local company. United offered, however, to produce any evidence in its possession relevant to a determination of reasonable rates to be charged by the Portsmouth Gas Company. The offer was not accepted and the petition was denied. In denying United's contention the Commission made a finding which appears as footnote 1 in this Court's opinion (317 U. S. 459) as follows:

> The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.

It should be noted that the offer to furnish inforination made by appellant in this case went beyond the offer made by United. United offered only to furnish information relevant to the determination of an issue over which the Commission had unquestioned jurisdiction. Appellant of-

fered to furnish the precise information specified by the Commission in its order, conditioned only on its being received as information without prejudice to the issue of regulatory authority.

When United's offer was refused, it commenced immediately an action for injunction in the federal court. This Court affirmed a decree enjoining the Commission from proceeding further. In so doing it held:

(a) That the Commission had no jurisdiction to regulate United's rates; that, under the Natural Gas Act, "the Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies" (317 U. S. 467); and

(b) That United was not required to await an actual regulatory order before testing the validity of the Commission's action since, under the circumstances, the order to furnish evidence constituted an assertion of regulatory jurisdiction which the Commission did not possess (317 U. S. 468-470).

2. Appellees assert, citing *Senn* v. *Tile Layers' Union*, 301 U. S. 468, that appellant is foreclosed from contending that the Supreme Court of Indiana erred in finding that the appellant is a public utility within the meaning of the Indiana statutes and, on the basis of this finding, holding that the provisions of the Public Utility Act of Indiana can be constitutionally applied to appellant's business in Indiana. In making this finding, the Supreme Court of Indiana relied not only on appellant's interstate sale to Anchor-Hocking Glass Company but also on its interstate sales to local distributing companies, most of whom are interveners in this case.

We submit that *Senn* v. *Tile Layers' Union is*, on the contrary, an authority in support of appellant's conten-

tion in this regard. In that case this Court denied a motion to dismiss the appeal, holding that the question, whether the state statute, *as construed* and *applied*, violated the Fourteenth Amendment, presented a substantial federal question which had never been expressly passed upon by this Court. Here, the question, whether the Public Utility Act of Indiana, *as construed* and *applied* to appellant's sale of gas directly to Anchor-Hocking Glass Company, violates the Commerce Clause, presents a substantial federal question which has never expressly been passed upon by this Court. The holding of the Supreme Court of Indiana that appellant's sales in Indiana to local distributing companies for resale make it a public utility subject to regulation by the State of Indiana is clearly error and should be reviewed and reversed. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550, 554; *State Corporation Commission* v. *Wichita Gas Company*, 290 U. S. 561, 563; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Company*, 314 U. S. 498; *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U. S. 456.

3. Appellees contend that, because this Court upheld the state taxes involved in *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148 and *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465, "a fortiori * * * police regulation of the type involved in this case" must be sustained. Appellees rely for support of this proposition upon language which appears in this Court's opinion in the recent case of *Freeman* v. *Hewitt*, —— U. S. ——, 67 S. Ct. (Adv. Ed.) 274. We think that appellees have failed to comprehend the import of the Court's full discussion of the scope of the Commerce Clause in that case. We submit that the controlling principles announced by this Court in that case require that the decision of the Supreme Court of Indiana in this case be reviewed and reversed.

4. Appellees attempt to distinguish cases cited by appellant by asserting that the Commerce Clause of the Constitution of its own force precludes state regulation only where the subject matter regulated requires national uniformity. While we do not concede that this is a correct statement of the law, we point out that the evidence in this case clearly shows that the nature of appellant's interstate business in Indiana is such that, if regulation is to be imposed, it must be uniform in order to avoid intolerable burdens on interstate commerce.

The sale of gas to the Anchor-Hocking Glass Company is made on an "interruptible" basis; that is to say, appellant reserves the right to curtail or to completely suspend deliveries of gas when the requirements of its customers whose service is not subject to interruption (such as distributing companies supplying domestic consumers) are such that gas is not available for delivery to interruptible customers. The uncontroverted testimony of appellant's witness, O. W. Morton (R. 226-229) shows that fair and nondiscriminatory curtailment and interruption of service to interruptible customers on its system requires consideration of many factors not confined to any one State, including temperature, wind velocity and pipeline pressure at various points along the line, and must be directed by a centralized authority. Such sales and service should not be subject to regulation by the respective States in which they happen to be made.

If appellant were required by The Public Service Commission of Indiana to deliver the full requirements of Anchor-Hocking without interruption, deliveries of gas to distributors in Ohio and Michigan could be so seriously affected as to cause danger to the lives and property of domestic consumers served by such distributors. Yet, if the decision of the Supreme Court of Indiana in this case is upheld, The Public Service Commission of Indiana may,

under the Public Service Commission Act of Indiana (Burns' Indiana Statutes, Annotated, Vol. 10, pp. 335 *et seq.*, Sections 54-101 *et seq.*), regulate all phases of appellant's sales and terms of service to Anchor-Hocking Glass Company. Under this Act, The Public Service Commission of Indiana may not only prohibit appellant from making any direct sales to industries in Indiana but may compel appellant to make direct sales to new customers even though to do so may impair its ability to render adequate service to its customers in other states. Furthermore, the evidence shows that the gas which appellant sells to Anchor-Hocking Glass Company at Winchester, Indiana (R. 65-66) is used in the manufacture of products which are sold almost entirely in interstate commerce, so that the type of service and the rates for gas to this company can have very little, if any, local effect. In fact, the opinion of The Public Service Commission of Indiana incorporated with its order of November 21, 1945, shows clearly that the proceeding against Panhandle was initiated by the local distributing companies which later intervened in the case and that the only local interest which the Commission seeks to serve by regulation of appellant's direct sales in Indiana is the protection of these distributing companies from any competition presented by appellant's ability to sell gas in interstate commerce to large industrial customers. All of these facts clearly distinguish this case from *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 23, relied upon by appellees.

## Conclusion

The Supreme Court of Missouri (*State ex rel. Cities Service Co.* v. *Public Service Commission* (1935), 85 S. W. (2d) 1890, cert. denied (1936) 296 U. S. 657) has held directly contrary to the decision of the Supreme Court of Indiana in this case; an authoritative decision

of this Court settling the question will be of great benefit to the natural gas industry and to the numerous state regulatory bodies concerned and will prevent diversity of rulings by courts of last resort in the states where interstate pipeline companies make interstate sales of natural gas direct to large industrial customers. In its opinion below, the Supreme Court of Indiana states that "the exact question now before this Court has never been decided by the Supreme Court of the United States." While we agree with this statement, we urge that the judgment from which this appeal is taken is clearly contrary to settled principles of law established by this Court, and appellees' motion to dismiss the appeal or, in the alternative, to affirm the judgment below should be denied.

Respectfully submitted,

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